No. 12,238

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ELMER R. JOHNSON,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

On December 22, 1946, Elmer R. Johnson was injured on the Island of Guam, a territorial possession of the United States, while riding in a motor vehicle belonging to the United States, which was at the time being operated by John F. Moore, an enlisted man in the United States Navy. On September 10, 1947, he filed his complaint for damages against the United States, in the United States District Court for the Northern District of California, Southern Division (R. 2, 3, 4, 5). Thereafter, on October 29, 1947, he filed in said District Court his First Amended Complaint for damages (R. 6, 7, 8, 9) in which he alleged that he was at that time a citizen and resident of the County of Contra Costa, State of California, that he

was injured while riding in a motor vehicle maintained and owned by the United States, that said vehicle was being operated by an employee of the Navy Department of the United States within the scope of his regular duties, that his injury was proximately caused by the carelessness and negligence of said employee of the United States while so acting in line of duty, and that as a result thereof he received injuries to his person to his damage in the sum of $90,000.00. The United States appeared in said District Court and filed in response to said First Amended Complaint for Damages, its Answer, in which it denied that plaintiff, Elmer R. Johnson, was damaged in any sum, denied that the vehicle was being operated at the time of the accident by any employee of the United States while acting within the scope of his employment or in line of duty, and denied that plaintiff's alleged injuries were the result of any carelessness or negligence on the part of the Navy Department employee, who was operating the vehicle, and alleged by way of affirmative defenses that the injuries and damages complained of, if any, were caused by an unavoidable accident, that they were caused by plaintiff's own contributory negligence, and that at the time of the accident the plaintiff and John F. Moore, the Navy Department enlisted man, were engaged upon a joint venture in the operation of the automobile. (R. 9, 10, 11, 12).

The cause proceeded to trial in the District Court, and judgment was rendered therein against the United States and in favor of Elmer R. Johnson, for damages

in the sum of $12,500.00, said judgment being entered on March 17, 1949 (R. 45, 46). The United States filed its Notice of Appeal from said judgment on March 18, 1949 (R. 47).

The United States District Court for the Northern District of California, Southern Division, had jurisdiction to hear said cause and render judgment therein under the Federal Tort Claims Act (Title 28 USCA, §§ 931, 932).

This Court has jurisdiction upon appeal under Title 28 United States Code § 1291.

STATEMENT OF THE CASE.

In December, 1946, Appellee Elmer R. Johnson, was a civilian employed by the United States Navy Department upon the Island of Guam. He worked at his said employment, as a painter, six days per week, being free on Sundays. During his off-duty hours, in the evenings and on Sundays, he performed work as a barber, self-employed. He arrived upon Guam December 7, 1946, to commence his employment (R. 56). On Sunday, December 22, 1946, Appellee met John F. Moore, a Navy pharmacist's mate, at the Naval Airbase on Guam (R. 71). Moore was required by his duties that day to proceed in a Navy motor vehicle from the Naval Airbase to the Naval Ammunition Depot for the purpose of turning in his daily report (R. 13, 74). He asked Appellee if he would like to go for a ride with him. They proceeded in the Navy vehicle to the

Naval Ammunition Depot (R. 72). There they met three sailors, including Seaman Homer L. Taylor, in the clubroom. In the course of a conversation, while listening to a football game (R. 60), mention was made of the fact that Appellee was a barber. The sailors asked him to cut their hair. He agreed to do so (R. 60). Appellee and the three sailors asked John F. Moore to drive them to the Naval Airbase, where Appellee had his quarters and barber shop (R. 72-73, 81). Moore agreed, and together with Appellee and the three sailors, proceeded in the Navy vehicle back to the Naval Airbase. Upon arrival, the Appellee cut the sailors' hair, and also that of several other persons. This required about two and one-half or three hours. (R. 61).

Thereafter, the sailors being hungry, Appellee told them where he ate his meals and they all agreed to go there (R. 61-62). This mess-hall was near the town of Agana, about a mile and a half away (R. 51). Moore again drove them. While at the mess-hall, mention was made by Moore about his being required to turn in his report (R. 63). Moore agreed to drive the three sailors back to their quarters at the Naval Ammunition Depot (R. 82). Appellee intended to go back to his quarters at the Naval Airbase (R. 64). They started out in the Navy vehicle to drive the three sailors to their quarters. Enroute, Seaman Homer L. Taylor suggested going to the Island Command Brig to collect some money owed to him by one of the sentries (R. 63, 82). They all proceeded to that place in the same vehicle. They stopped off at the guardhouse

(Brig) for about five minutes (R. 63). Then they proceeded in the Navy vehicle, with Moore driving towards the Ammunition Depot (R. 82).

Enroute, while starting down a long hill, the automobile began to shimmy and shake the front wheels (R. 65). It overturned (R. 82). Appellee received personal injuries as a result of the overturning of the vehicle.

SPECIFICATIONS OF ERROR.

I.

The District Court erred in denying Appellant's motion for judgment of dismissal, because the evidence before the Court failed to establish any claim in favor of Appellee against Appellant upon which relief could be granted.

II.

The District Court erred in finding that John F. Moore, the operator of Appellant's vehicle was acting in line of duty, because of evidence established as a matter of law that said John F. Moore was not acting in line of duty in operating said vehicle at the time of the accident which resulted in Appellee's injuries.

III.

The District Court erred in finding that Appellee was injured as a result of carelessness on the part of John F. Moore in the operation of the Appellant's motor vehicle, because the evidence failed to establish

any careless or negligent act or omission on his part which proximately caused the Appellee's injuries.

ARGUMENT.

I.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF DISMISSAL, BECAUSE THE EVIDENCE BEFORE THE COURT FAILED TO ESTABLISH ANY CLAIM IN FAVOR OF APPELLEE AGAINST APPELLANT UPON WHICH RELIEF COULD BE GRANTED.

A. The Federal Tort Claims Act, being a partial relinquishment of sovereign immunity to suit, must be strictly construed.

There is no right of action against the United States for damages arising out of the tortious act or omission of an employee of the United States except such right as is given by the Federal Tort Claims Act. This Act confers jurisdiction upon the United States District Court to hear, determine, and render judgment upon claims asserted against the United States by certain persons on account of certain acts or omissions on the part of employees of the United States. As a relinquishment of sovereign immunity, it must be strictly construed.

U. S. v. Sherwood (1940), 312 U.S. 584 at 590.

> "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no

matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government.

Schillinger v. U.S. (1894), 155 U.S. 163 at 166.

The United States District Courts, being courts of limited jurisdiction, have no authority to hear and determine any causes other than those they are authorized by statute to hear and determine. Statutes conferring additional jurisdiction upon the District Courts should therefore be strictly construed.

B. The jurisdiction conferred upon the District Courts by the Federal Tort Claims Act is limited to certain specified types of claims.

The Act confers jurisdiction upon the District Courts to hear, determine and render judgment only upon claims against the United States

"on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damages, loss, injury, or death in accordance with the law of the place where the act or omission occurred."

Federal Tort Claims Act (Public Law 601, 79th Congress, 2nd Session, Chapter 753, § 410; Title 28 USCA § 931).

If upon the trial of the cause, the evidence fails to establish that the claim sued upon is within the class

of claims enumerated in the Act, the Court has no jurisdiction to render judgment upon the claim, and the action must be dismissed.

The class of claims enumerated in the Act contains two essential elements which must be established by the evidence. If either element is lacking, the claim is not one upon which relief can be granted in the District Court. These elements are:

1. The claim must be for damages caused by the negligent or wrongful act or omission of an employee of the Government;

2. The employee of the Government must have been acting within the scope of his office or employment, or in the case of members of the Army or Navy, acting in line of duty.

We respectfully invite the Court's attention to two decisions of the United States District Courts involving suits brought against the United States under the Federal Tort Claims Act, upon claims for damages for personal injuries arising out of the operation of government owned motor vehicles by enlisted men in the United States Army. In each case a motion to dismiss was made by the defendant United States of America and in each case it was granted.

In the case of

Long v. United States, 78 Fed. Supp. 35,

a case heard in the District Court for the Southern District of California, involving an automobile accident occurring in the State of California, the Court pointed out that it is only in cases where the govern-

ment employee was in fact "acting within the scope of his office or employment" that the United States has consented to be sued, and that if the facts fail to establish that he was so acting, the District Court has no jurisdiction and the action must be dismissed.

In

Cropper v. United States, 81 Fed. Supp. 81,

an action brought in the District Court for the Northern District of Florida, the Court cited with approval the decision of District Judge Mathes in the *Long* case, supra, and the Court stated, at page 82:

> "In construing the Tort Claims Act, however, it must be kept in mind that the government has waived sovereign immunity to suits only as to claims falling squarely within the four corners of the Act."

C. The evidence before the District Court having failed to establish that Appellee's injuries were caused by any wrongful or negligent act or omission on the part of an employee of the Government while acting in line of duty, Appellee's action should have been dismissed.

The District Court rendered judgment in favor of Appellee, basing said judgment upon certain findings of fact and conclusions of law which were erroneous and not supported by the evidence adduced upon the trial of the cause.

The District Court found that John F. Moore, an enlisted man in the United States Army, was acting in the line of duty while operating the motor vehicle at the time that it overturned and Appellee was injured. In making this finding the Court erred, as will be shown in section II of this Argument.

The District Court found that Appellee's injuries were proximately caused by carelessness on the part of said John F. Moore. In making this finding the Court erred, as will be shown in section III of this Argument.

Both of these findings being unsupported by the evidence, it follows that Appellee failed to establish a claim upon which relief could be granted by the District Court, and Appellant's motion for a Judgment of Dismissal should have been granted.

II.

THE DISTRICT COURT ERRED IN FINDING THAT JOHN F. MOORE, THE OPERATOR OF APPELLANT'S VEHICLE WAS ACTING IN LINE OF DUTY, BECAUSE THE EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT SAID JOHN F. MOORE WAS NOT ACTING IN LINE OF DUTY IN OPERATING SAID VEHICLE AT THE TIME OF THE ACCIDENT WHICH RESULTED IN APPELLEE'S INJURIES.

A. The District Court's finding that John F. Moore was acting in the line of duty is contrary to all the evidence.

The only evidence before the District Court upon this phase of the case consisted of the admitted facts, the statement of John F. Moore, and the testimony of the Appellee. In order to make a finding it was necessary for the Court to discover in the evidence before it, the answer to each of the following questions:

1. What was Moore required to do on the day of the accident?

2. What did he do?

We summarize here briefly the evidence responsive to each of these questions.

1. "On the afternoon of December 22, 1946, John F. Moore was required by his duties to proceed to the Dispensary at the Fifth Service Depot, to turn in his daily report". (Request for Admission of Facts, R. 13, admitted by Appellee. R. 16, 80). "On 22 December, 1946, I was going to the dispensary at the Fifth Service Depot to take in my daily report". (Statement of John F. Moore, R. 101). "He had to turn in his report near where he was employed down near the ammunition depot. He is employed near the ammunition depot, I believe the 5th Service Depot. That is where he is stationed". (Testimony of Appellee, R. 74).

> "Q. Then you understood he had to go back towards the ammunition depot again?
>
> A. Yes, sir". (Testimony of Appellee, R. 74).
>
> "Mr. Moore stated he would have to go back and turn in his report where he was stationed". (Testimony of Appellee, R. 63).

The evidence shows that Moore, in order to turn in his report, was required to drive from the Naval Airbase to the Ammunition Depot, where he was stationed.

2. John F. Moore met the Appellee at the Naval Airbase on the day of the accident (R. 58). He asked Appellee if he would like to take a ride with him (R. 58, 72). Together they drove from the Airbase to the Ammunition Depot in a Navy vehicle operated by Moore (R. 59, 72). Upon arriving at the Ammunition

Depot, Moore did not turn in his report. (R. 15, 16, 63, 82). Instead, Moore and Appellee went to some living quarters and then into the clubrooms, where they met three sailors (R. 59, 60). They spent some time in social conversation, and listened to a football game (R. 12, 16, 60, 80). The sailors learned that Appellee was a barber and asked him to cut their hair, to which he agreed (R. 60, 81). Appellee and the sailors asked Moore to drive them from the Ammunition Depot to the Naval Airbase, where Appellee's barber shop was located (R. 60, 81). Moore drove back to the Naval Airbase, taking Appellee and the sailors (R. 60, 81-82). Appellee thereupon cut the sailors' hair, and also that of the three additional persons (R. 61). This took several hours. Thereafter being hungry, a discussion arose concerning where they should eat (R. 61-62). Appellee told them where he ate his meals and they all agreed to go there (R. 61-62). This messhall was about one and one-half miles from the Naval Airbase (R. 57, 73). Moore drove Appellee and the three sailors to this place (R. 62). While they were there, Moore remembered his duty, and mentioned that he would have to go back to the Ammunition Depot to turn in his report (R. 63). The sailors asked him to return them to the Ammunition Depot (R. 82). Moore undertook to do this and agreed to take Appellee back to the Naval Airbase (R. 73, 82). After they started for the Ammunition Depot, one of the sailors asked Moore to drive to the Island Command Brig (guard house) so that he might collect some money from a sentry. Moore drove them all there (R. 82). They stopped off about five minutes and then resumed

the trip to the Ammunition Depot (R. 63, 82). Shortly thereafter, while proceeding down a hill, the vehicle overturned, resulting in injury to the Appellee. At the time the vehicle overturned, Moore had not yet turned in his report at the Ammunition Depot (R. 82).

Does this evidence support a finding that Moore was operating the vehicle in the line of duty at the time it overturned? We submit that it does not.

The evidence shows that Moore's duty required him to drive the vehicle from the Naval Airbase to the Ammunition Depot so that he might turn in a report at that place. The evidence shows that he made the trip required, taking the Appellee with him. Upon arrival, he neglected to turn in his report. Having made the required trip, he then embarked upon a course of travel in the Navy vehicle wholly unconnected with his employer's business, and entirely outside his line of duty.

(a) He drove Appellee and three sailors back to the Naval Airbase upon their own private business—so that Appellee might earn a profit by cutting their hair.

(b) He then drove Appellee and Appellee's customers a mile and a half further, upon a personal venture—so that he, the sailors and Appellee might eat dinner at Appellee's mess-hall.

(c) He then drove to the Island Command Brig upon business of one of the sailors—so that Seaman Taylor might collect a debt.

(d) He then started to drive Appellee and the sailors to their living quarters at the Naval Airbase and the Ammunition Depot respectively—it was upon this trip that the accident occurred.

B. The District Court should have found as a matter of law that John F. Moore was not acting in line of duty at the time of the accident.

The law of the place where the accident involved in this cause occurred is contained in a Civil Code and Code of Civil Procedure in force upon the Island of Guam. These codes were adapted from the California Civil Code and California Code of Civil Procedure in effect in 1943. We submit that, in the absence of reported decisions of the Guam courts, the decisions of the California courts may properly be considered highly persuasive.

Upon the question of the liability of an employer for the acts of his employee and upon the question of what constitutes a departure by an employee from the scope of his employment, there are many decisions of the California courts.

In general it is stated that if an act of an employee is for the benefit of his employer, either directly or indirectly, or fairly to be implied from the nature of the employment and his duties incidental to it, it is within the scope of his employment.

Casselman v. Hartford Acc. & Indem. Company, 36 Cal. App. (2d) 700;
Naudack v. Canini, 29 Cal. App. (2d) 687;
Sullivan v. Thompson, 30 Cal. App. (2d) 675.

On the other hand, if the employee's acts are not for the benefit of the employer or connected in any way with the purpose of his employment but are for the employee's particular and personal benefit or purposes, his acts are not within the scope of his employment.

Nussbaum v. Traung Label, etc. Co., 46 Cal. App. 561.

"As soon as the driver steps aside from the owner's business and enters upon the performmance of some independent purpose of his own, he ceases to act as the agent of the owner and the latter's responsibility for his act terminates".

Martinelli v. Bond, 42 Cal. App. 209 at 211.

"If a servant abandons or departs from a business of his master and engages in some matter solely for his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual or exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to his master".

Gousse v. Lowe, 41 Cal. App. 715 at 718.

The California Courts have repeatedly held that the use by an employee of his employer's vehicle for the purpose of going to meals is not within the scope of his employment.

Carnes v. Pacific Gas and Electric Co., 21 Cal. App. (2d) 568;

Helm v. Bagley, 113 Cal. App. 602;
Adams v. Tuxedo Land Company, 92 Cal. App. 266;
Humphrey v. Safeway Stores, Inc., 4 Cal. App. (2d) 589;
Kish v. California State Automobile Association, 190 Cal. 246.

So also it has been held that where a driver uses his employer's vehicle for the purpose of going between his place of employment and his residence, that use was personal and amounted to a departure from the scope of his employment.

Kish v. California State Automobile Association, supra;
Mauchle v. Panama Pacific International Exposition Company, 37 Cal. App. 715;
Clough v. Allen, 115 Cal. App. 330;
Humphrey v. Safeway Stores, supra.

In

Gousse v. Lowe, supra,

the employee's duties involved taking his employer's vehicle, when necessary, to the public garage, where it was stored, for supplies. On the date of the accident involved in that case, he did not ask permission to take the car to the public garage, but because he needed gasoline, he took it there during the noon hour. He ate his mid-day meal and serviced the car. Instead of then returning the vehicle to his employer's residence, he drove to a tailor shop two and one-half miles in the opposite direction, in order to have alterations made

upon his overcoat. He made this trip because he concluded that he did not have enough time to take a street care to the tailor shop, get back to the garage, and deliver the car to his employer's residence by two o'clock, as directed. He reached the tailor shop and started back, and when about one mile from the garage had the accident for which it was claimed his employer was liable under the doctrine of *respondeat superior*. The Court, in deciding that the employer was not liable, held that the employee was not acting within the scope of his employment. The Court said:

> "Upon an errand of his own the man left the garage and had not returned to within a mile of it when the collision occurred. He took his master's automobile, not in furtherance of any business of the master, but solely because it was a quicker means of conveyance than a street car, because without using it he would not have had time to attend to his private business. * * * This is not the case of a mere slight deviation from the line of duty but a departure for the purposes of the servant".

In the case of

Gordoy v. Flaherty, 9 Cal. (2d) 716,

the employee was a service station attendant whose duties involved going to town to get change and to turn in money at a branch office, there being no prescribed route for these errands. On the day of the accident, he drove to the bank to get change, intending thereafter to go to the branch office to leave the money. He picked up a friend at the bank who requested him

to drive her to her home. He proceeded with her toward the company branch office but instead of stopping thereat, proceeded beyond for the purpose of taking his friend home. About three blocks beyond the branch office the accident occurred, for which it was claimed the employer was liable. The Court held that the employee was not acting within the scope of his employment, saying:

> "But it was not a mere deviation when he actually passed the company office and proceeded in the direction of a place which had no relation to the company business. This was a real departure from the employment, despite the fact that he intended subsequently to return to his employer's business; and during such departure the employer was not liable for the employee's tort."

In the opinion in *Gousse v. Lowe,* supra, the California Court cited with approval the decision of the U. S. Circuit Court of Appeals in

Patterson v. Kates, 152 Fed. 481.

In that case the employee had been instructed to drive his employer's automobile from Atlantic City to Philadelphia. His route took him through Northmount and then Gloucester, which towns were a few miles apart. When he reached Gloucester, he met a man who asked him to take him back to Northmount, which the employee did. Upon reaching that place, he turned about to proceed again to Gloucester, and thence to Philadelphia, but before he reached Gloucester he was involved in an accident. The Court held that he was not acting within the scope of his employ-

ment, having completely abandoned or departed from the purposes of his employment by returning to Northmount and during his return trip to Gloucester. The Court said at (page 483):

> "As it seems to me, the driver had temporarily abondoned his employment and had gone off on an expedition of his own, for a purpose in no way connected with his duty, but, on the contrary, opposed thereto, and I do not think that he could bind his master while he was engaged about his private affairs. Of course he had no express authority to turn back for such a purpose and I am unable to see upon what grounds the master's assent to his deviation can be fairly implied."

Where the evidence before the trial court consists of admitted facts, or where there is no conflict in the evidence, the question of whther the employee was acting in the line of duty ceases to be a question of fact and becomes a question of law.

> "While ordinarily the question of whether or not the act was within the scope of the servant's employment should be submitted to the jury, in this case the only evidence was that at the time of the injury the servant was upon a trip for his own purposes contrary to his master's orders. It is only where reasonable men may differ in regard to the facts that a case should go to the jury. If the facts are admitted or are susceptible of but one meaning, it becomes the duty of the judge to declare the law upon the admitted facts."

Gousse v. Lowe, supra.

> "There is an entire lack of any evidence supporting the theory that Bachman was on his employer's business or acting within the scope of his employment at the time of the accident. Under this circumstance the question is one of law for the court, namely, is the implied finding supported by any evidence? * * *"
>
> *Humphrey v. Safeway Stores,* supra.

In the instant case there is no conflict in the evidence, nor is there any dispute as to the facts upon this phase of the case. Moore's duty required him to drive from the Airbase on Guam to the Ammunition Depot in order that he might turn in a report at that place. He made the trip required by his duty, but did not turn in the report. Thereafter he undertook to drive his employer's vehicle upon business in no way connected with his duty or his employer's business, namely, first to transport Appellee's customers to Appellee's barber shop; second, to transport Appellee and Appellee's customers to another place, to eat a meal; third, to drive Seaman Taylor to the guardhouse upon personal business of Taylor; and fourth, to drive all persons involved to their respective places of abode.

We respectfully submit that there was not any evidence before the District Court which supports a finding that Moore was acting in the line of duty; that all the evidence was to the contrary; and that the District Court should have found, as a matter of law, that Moore had departed entirely from his employer's business, and was not acting in line of duty at the time of the accident involved herein.

III.

THE DISTRICT COURT ERRED IN FINDING THAT APPELLEE WAS INJURED AS A RESULT OF CARELESSNESS ON THE PART OF JOHN F. MOORE IN THE OPERATION OF APPELLANT'S MOTOR VEHICLE, BECAUSE THE EVIDENCE FAILED TO ESTABLISH ANY CARELESS OR NEGLIGENT ACT OR OMISSION ON HIS PART WHICH PROXIMATELY CAUSED THE APPELLEE'S INJURIES.

The evidence before the District Court upon the question of negligence in the operation of the automobile is not sufficient to support the Court's findings on this phase of the case.

We quote what we believe to be *all* the evidence before the District Court on this question:

1. **From the admitted statement of facts:**

"After stopping at the Island Command Brig, Moore and the others proceeded on their way to the Ground Ammunition Depot. Enroute the vehicle in which they were riding overturned." (R. 15, 16, 82).

2. **From the testimony (statement) of John F. Moore:**

"We stopped there and started back to the Naval Ammunition Depot. We had not gone very far when the truck started to slide. I tried to keep control, but could not. I do not remember what happened after that." (R. 101).

3. **From the testimony of Appellee Elmer R. Johnson:**

Q. Go ahead and tell what happened.

A. We were just starting down this long hill. It rains quite frequently over there, every ten

minutes a shower will come, and the sun will come out, and then it will rain, and then the sun will come out. I think it was dry that day and the car began to shimmy and shake the front wheels and the accident occurred right then and there. I can't remember. The whole side of my head was just a mass of blood, and I can't hear very well out of this ear yet.

Q. What happened?

A. Anyway, I don't know. My head hit, and that is the end.

The Court: The car started shimmying and you cannot remember what happened?

A. The car started shimmying and I cannot remember what happened.

Mr. Downey. I believe the stipulations of fact cover the fact that the vehicle did turn over." (R. 65).

This is *all* the evidence concerning the manner in which the accident occurred. From this alone the District Court made the following finding of fact:

> "that during the said ride the said John F. Moore so carelessly operated the said vehicle so as to cause the same to turn over and to cause certain injuries to plaintiff." (R. 43),

and the following conclusion of law:

> "(2) That the said Naval employee was guilty of carelessness and negligence and that such carelessness and negligence proximately caused certain personal injuries to plaintiff". (R. 44).

Is the evidence sufficient to warrant such a finding of fact and such a conclusion of law? We respectfully submit that it is not.

The mere happening of an accident does not import negligence. There must be something in the evidence to establish negligence as a fact.

In order to determine whether the operator of the vehicle was careless or negligent, it is necessary to find in the evidence consisting of admitted facts, the testimony of the witnesses and reasonable inferences drawn therefrom, the answer to the following question:

> "Did he do anything which a person of ordinary prudence exercising ordinary care would not have done under the circumstances, or fail to do something which such a person would have done under the circumstances?"

There is no evidence whatsoever in the record as to what the driver did or what he did not do, except his own statement that after the automobile "started to slide", he "tried to keep control but could not." There is no evidence from which the Court could determine what caused the vehicle to "slide" or "shimmy". Was it moving too fast? Did it skid? Was it being driven in some unusual fashion? Was there a mechanical failure of some part of the vehicle's equipment? The answer to none of these questions is to be found in the evidence.

Appellee, upon the trial of the cause, had the opportunity of supplying the Court with evidence upon this essential element of his case. He did not do so. He was personally in a position to give testimony concerning the actions of the driver of the vehicle. He did not do so. He was riding in the front seat of the

automobile. No one sat between him and the driver. (R. 63). Had there been anything unusual about the driver's conduct, he could have observed it, and could have testified concerning it. He did testify as a witness on his own behalf. He was the plaintiff in the Court below. The burden was upon him of establishing the allegations of his complaint by a preponderance of the evidence. His failure to introduce evidence available to him leads to the inference that such evidence, if introduced, would be unfavorable to him.

He did not testify concerning the speed at which the vehicle was being operated. It may be inferred then, that the speed was not excessive. Had it been, he would have so testified.

He did not testify concerning the conduct of the operator. It may be inferred then, that there was nothing unusual or significant about his conduct. Had there been, Appellee would have so testified.

He did not testify concerning any circumstances connected with the operation of the vehicle or the physical condition of the operator. Had there been anything unusual or significant about the circumstances or the physical condition of the operator, Appellee would have so testified.

Since the burden of proof lay with Appellee, he was under the duty of supplying the Court with all the proof available to him which was favorable to his case. His silence upon material matters must be construed against him.

In order to make the finding of fact and conclusion of law quoted above, it was necessary for the District Court to follow a line of reasoning supported by neither law nor logic, since there was no justification in the evidence for application of the doctrine of *res ipsa loquitur* or any similar evidentiary hypothesis.

To arrive at the Court's conclusion that there was negligence in the operation of the automobile, it is necessary to assume that where there is an automobile accident there *must* be negligence. As we have pointed out, there is a complete lack of evidence in the record regarding what the operator was or was not doing, save that he was operating the vehicle while it was in motion, starting down a long hill. In order to conclude that he was driving in a careless or negligent manner, the Court must have assumed that he was doing something that he should not have done, or that he failed to do something that he should have done.

There is no basis in the evidence upon which the Court could have inferred that he was driving too fast or too slow or too near the edge of the road, that he failed to keep the vehicle in gear, that he failed to apply the brakes, that he was inattentive to his driving, that he was not in control of his faculties, that he was driving a vehicle which he knew was not in proper mechanical condition, that he knew the road was unsafe for travel, or any other *fact* which could be construed to constitute negligence.

In order to make a finding of negligence, it was necessary for the Court to indulge in speculation, since

there was no evidence before the Court as to the cause of the accident.

Findings of fact and conclusions of law, like the verdict of a jury, must be based upon *facts* appearing from the evidence and upon reasonable and logical inferences naturally arising *from such facts.* Inferences, as basis for findings of fact, must arise *from facts* appearing from the evidence and not from *other inferences* supplied by the Court or jury in the place of facts not established by the evidence.

Here, the only *facts* appearing from the evidence are that the vehicle, while starting down a long hill, started to "shimmy" or "slide", that the driver tried to keep it under control but could not, and that it overturned and Appellee was injured. In order to find from this evidence that Appellee's injuries were caused by the carelessness or negligence of the driver, the Court must of necessity have resorted to a series of inferences upon inferences.

> First, that the car overturned as a result of either the "shimmying" or "sliding" or as a result of the driver being unable to keep it under control;
>
> Second, that the "shimmy" or "slide" was caused by some unspecified act or omission of the driver, or that some act or omission of the driver resulted in his being unable to keep the vehicle under control;
>
> Third, that such act or omission of the driver consisted in his doing something that a person of ordinary prudence exercising ordinary care would

not have done under the circumstances, or his failure to do something that such a person would have done under the circumstances.

We respectfully submit that a finding of fact so evolved is not based upon facts and proper inferences drawn therefrom, but is rather founded upon pure speculation.

CONCLUSION.

For the reasons heretofore set forth, we respectfully submit that the judgment of the District Court should be reversed, and the cause remanded with instructions to the District Court to enter judgment of dismissal in favor of Appellant, United States of America.

Dated, San Francisco, California,
September 7, 1949.

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